gravaman of the Government's complaint[2] was that the defendants and their alleged co-conspirators had agreed to eliminate all competition in the development of air pollution control equipment and that they had agreed and conspired "to install motor vehicle air pollution control equipment only upon a uniform date determined by agreement, and subsequently agreed on at least three separate occasions to attempt to delay the installation of motor vehicle air pollution control equipment."[3]

The defendants did not answer the complaint. Instead, following the entry of several stipulations extending their time for answer, the parties filed a stipulation for entry of a consent judgment terminating the litigation. The district court entered an order setting the matter for hearing and invited interested persons to submit memoranda of their views.

Pursuant to the district court's order, the City of New York applied for leave to intervene "for the limited purpose of participating in the proceedings to be held in connection with the stipulation and proposed consent judgment * * *." The City did not take a position on the merits of the proposed decree, arguing instead that "the record presently before the Court is insufficient to permit an informed determination that the proposed judgment is consistent with the public interest." The City suggests that the parties be required to provide the court "with a record demonstrating that on the basis of a full investigation the evidence available to [the Government] demonstrates

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[2] The complaint is set forth in Appendix C, *infra*, pp. 17a-25a.

[3] The complaint particularized the three separate occasions on which the defendants were charged with agreeing not to install presently available antipollution devices. App. C, *infra*, pp. 22a-23a.

that the proposed judgment is fully consistent with the public interest." Alternatively, the City suggested that the court condition its approval of the decree upon the inclusion of a provision, patterned after the so-called "asphalt clause",[4] making the judgment *prima facie* evidence of the statutory violations set forth in the complaint.

The district court held a hearing devoted to legal arguments from proponents and opponents of the decree. At the conclusion of oral argument, the court denied all applications for intervention and approved the consent decree as submitted by the parties. In its oral opinion, the court set forth its reasoning:

> "In approaching this problem the court must move cautiously lest it override an administrative decision based upon matters of policy with which this court cannot properly interfere.
>
> "Consent decrees which result from informal negotiations between the Antitrust Division and defendants in these cases are numerous, and they are most always without exception ratified by the court with little or no change.
>
> "Under well-established law, this decree must be approved unless this court finds some legal defect in it such as its unenforceability according to its terms, or its failure to provide relief which is consistent with the complaint. It is the court's duty to protect the rights of persons who are not parties to the action and, of course, the decree should not be approved if it is contrary to the public interest." App. B, *infra*, p. 3a.

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[4] See *United States* v. *Lake Asphalt & Petroleum Co. of Mass.*, 1960 Trade Cas. ¶ 69,835 (D. Mass. 1960); *United States* v. *Allied Chemical Corp.*, 1961 Trade Cas. ¶ 69,835 (D. Mass. 1960); *United States* v. *Bituminous Concrete Assoc.*, 1961 Trade Cas. ¶ 69,878 (D. Mass. 1960).

Subsequently, the court filed a memorandum opinion. App. B, *infra*, pp. 9a-15a.

Thereafter, the City applied for leave to intervene *after* judgment for purposes of taking an appeal to this Court. In that application, the City alleged that even if the United States had adequately represented its interests prior to judgment, those interests were no longer being adequately represented since the United States did not contemplate seeking appellate review of the district court's determination to approve the decree without requiring the parties to provide a record basis for concluding that the decree was in the public interest. The district court denied that application by order entered December 17, 1969.

THE QUESTIONS ARE SUBSTANTIAL

The City of New York contended below that a consent decree not otherwise admissible as *prima facie* evidence should not be entered unless and until the proponents of that decree presented a record sufficient to enable the District Judge independently to determine that the proposed decree was in the public interest. Here, the District Judge concluded that the decree *was* in the public interest, but he did so without requiring the parties to furnish a record sufficient to support that determination. Such a procedure can be justified only if: (1) an antitrust defendant has a *right* to a consent decree without *prima facie* effect when it accedes to all substantive demands for relief set forth in the Government's complaint or (2) the district court has no independent judicial function to perform when a proposed consent decree without *prima facie* effect is challenged by a responsible public body. These issues, which this Court left open in *United*

States v. *Ward Baking Co.*, 376 U.S. 327, 332, are deserving of plenary consideration, not only because they are substantial, but because they frequently recur.[5] Until this Court speaks, both public agency litigants and trial courts are without firm guidelines in this important and much litigated area of the antitrust laws.

1. By submitting a consent judgment, the parties sought judicial action.[6] Proper discharge of that judicial function required the District Judge "to make an independent judgment as to the merits of an antitrust consent decree." *Utah Public Service Comm.* v. *El Paso Natural Gas Corp.*, 395 U.S. 464, 476 n. 4 (Harlan, J., dissenting). The City contended that the absence[7] from the decree of a provision having Section 5(a) consequences was a matter calling for the trial court's independent determination that the proposed decree was in the public interest. The trial judge held that such an absence was not to be considered in deciding whether the decree satisfied the public interest. App. A at 3a.

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[5] This Court has been repeatedly confronted with appeals arising from consent judgment proceedings in antitrust cases. *E.g.*, *United States* v. *Ward Baking Co.*, 376 U.S. 327; *Utah Public Service Comm.* v. *El Paso Natural Gas Corp.*, 395 U.S. 464; *City of New York* v. *United States*, 390 U.S. 715; *Thrifty Shoppers Script Co.* v. *United States*, 389 U.S. 580.

[6] *E.g.*, *United States* v. *Carter Products, Inc.*, 211 F. Supp. 144, 147-148 (S.D.N.Y. 1962); *cf. United States* v. *Swift & Co.*, 286 U.S. 106; *United States* v. *Radio Corp. of America*, 46 F. Supp. 654 (D. Del. 1942), *appeal dismissed*, 318 U.S. 796; *Chrysler Corp.* v. *United States*, 316 U.S. 556, 567-571 (Frankfurter, J., dissenting).

[7] In its complaint, the Government sought an adjudication "that the defendants have engaged in a combination and conspiracy, in unreasonable restraint of the aforesaid interstate trade and commerce, in violation of Section 1 of the Sherman Act." App. C, *infra*, pp. 23a-24a.

In *United States* v. *Ward Baking Co., supra,* 376 U.S. at 334, this Court left open the question whether an adjudication having *prima facie* effect constituted an independent item of relief so that, even were a defendant to consent to all of the Government's other demands for relief, a consent judgment could nonetheless be withheld. Given the strong Congressional policy undergirding Section 5(a) of the Act, we think the issue left unanswered in *Ward Baking* must be answered in the affirmative here. The Antitrust Division agrees that it has authority to withhold approval of a consent decree lacking *prima facie* effect. Assistant Attorney General McLaren recently stated:

> "I would not expect to see an 'asphalt clause' contained in any great number of consent decrees in the future. However, in situations where the Division has determined to oppose the entry of nolo pleas in order to aid private litigants, but where the court nevertheless accepts the nolo pleas, it would seem to follow that in any companion civil case the Division should consider going to trial if the defendants will not agree to the inclusion of an 'asphalt clause' in the decree. In making this determination, we would consider whether the strength of the Division's civil case is such that there is a substantial chance to obtain a favorable judgment."[8]

There are, it is true, counterveiling considerations bottomed in the consent decree proviso which Congress included in Section 5(a) and which one district court found persuasive in holding that defendants do have a right to insist upon entry of a consent decree lacking *prima facie* effect as long as they are willing to accede

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[8] *The Government and the Private Antitrust Suit,* Department of Justice Release, December 11, 1969, p. 13.

to all of the Government's other demands for relief.[9] But this only serves to emphasize the need for plenary consideration of this important and recurring issue.

2. Assuming that an antitrust defendant does not have a right to insist upon a consent decree lacking in *prima facie* effect [10] even though it is otherwise willing to accede to the Government's other demands for relief,[11] the district court was required to make an independent, judicial determination that the omission was in the public interest. In making that determination, the court would properly give weight to the Attorney General's determination that the decree was in the public interest, and the court would consider that settlement of antitrust litigation is encouraged by the Congressional policy reflected in Section 5(a)'s proviso. But granting all of this, the district court could not, we submit, resolve the public interest issue *in vacuo*.

The record before the District Judge consisted solely of the Government's complaint and the proposed de-

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[9] *United States* v. *Brunswick-Balke-Collender Co.*, 203 F. Supp. 657 (E.D. Wisc. 1962).

[10] Such effect would follow from an adjudication after trial. Its substantial equivalent would be the insistence, either administrative or judicial, on the inclusion of an "asphalt clause" before a consent decree is approved.

[11] It is arguable that the decree did not provide all the relief which would be available to the Government following trial. Under the prayer for "other, further and different relief," the Government would be entitled to relief consonant with the evidence introduced. *United States* v. *Ward Baking Co.*, *supra*, 376 U.S. at 333 and n. 3. Such relief may well have included a decree requiring the defendants to install antipollution devices on cars now on the road. The district court, however, held the "other, further and different" relief clause to mean "little if anything." App. A, *infra*, p. 4a. *Ward Baking* teaches otherwise.

cree. If the allegations of that complaint were true, the defendants had flagrantly and deliberately violated the antitrust laws for more than fifteen years and had thereby endangered the health of millions of people and had been the direct cause of incalculable damage to the City of New York and other heavily populated urban areas plagued with air pollution problems. If substantial evidence were available to prove these allegations, and if there were no counterveiling considerations advanced by the defendants, the District Judge could well have concluded that the decree was contrary to the public interest. Cf. *United States* v. *Standard Ultramarine & Color Co.*, 137 F. Supp. 166 (S.D.N.Y. 1955); *United States* v. *Carter Products, Inc.*, 211 F. Supp. 144, 147-148 (S.D.N.Y. 1962).

Here, the District Judge purported to find the decree in the public interest, but he failed to avail himself of the one indispensible ingredient of judicial action—a record sufficient to permit informed adjudication of the issue. We contend that as proponents of the decree, the United States and the defendants had an obligation to provide the court with a record sufficient to permit informed decision of the public interest issue. Perhaps written submissions from the parties would have sufficed,[12] or perhaps other acceptable alternatives were available. We assume that the district courts have a wide latitude in consent judgment proceedings, and that the record required to demonstrate that a particular decree satisfies the public interest will vary from case to case. But we think it perfectly plain that, assuming a consent decree calls for a judicial

[12] Compare the procedure followed in *United States* v. *Standard Oil Co.*, 1959 Trade Cas. 75522, 75526 (S.D. Calif. 1959).

determination of the public interest issue, that issue cannot be resolved, as the District Judge tried to resolve it, by laying the complaint alongside the decree. App. A, *infra*, pp. 3a-4a, 14a.

3. Resolution of these issues is determinative of the City's intervention application which forms the predicate for appellate review here. Had the court properly considered the public interest issue on an appropriate record, it could have denied intervention on the ground that the City's interest had been adequately represented. But when it failed to do so, it became clear that the City was entitled to intervene—not only because its interests were inadequately represented by the parties,[13] but also because there is no other way by which appellate review of these important issues can occur.[14]

CONCLUSION

The procedure followed in the district court raises questions of fundamental importance in the administration of the antitrust laws. These questions, which are as difficult as they are significant, should be resolved following full briefing and argument. Since the City's right to intervene depends upon resolution of the other issues presented, an order should be entered postponing consideration of the question of jurisdic-

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[13] *E.g.*, *Cascade Natural Gas Co.* v. *El Paso Natural Gas Corp.*, 386 U.S. 129.

[14] *E.g.*, *Banks* v. *Chicago Grain Trimmers Assoc.*, 389 U.S. 813; *Zuber* v. *Allen*, 387 F. 2d 862 (D.C. Cir. 1967); *Pellegrino* v. *Nesbit*, 203 F. 2d 463 (9 Cir. 1953); *Wolpe* v. *Poretsky*, 144 F. 2d 505 (D.C. Cir.), *cert. denied*, 323 U.S. 777 (1944).

tion until the hearing of the case on the merits. *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683.

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